

BRYAN CAVE LLP
120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

Glenn J. Plattner (SBN 137454)
David Harford (SBN 270696)
BRYAN CAVE LLP
120 Broadway, Suite 300
Santa Monica, California 90401
Telephone: (310) 576-2100
Facsimile: (310) 576-2200
E-Mail: glenn.plattner@bryancave.com
david.harford@bryancave.com

Attorneys for Defendants
RECONTRUST COMPANY, N.A.;
COUNTRYWIDE HOME LOANS, INC. for itself and dba
AMERICA'S WHOLESALE LENDER; and
BAC HOME LOANS SERVICING, LP

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DERL BROWN II, an individual,

Plaintiff,

vs.

RECONTRUST COMPANY, an entity of
unknown form; COUNTRYWIDE HOME
LOANS, INC., a New York Corporation;
BAC HOME LOANS SERVICING, LP a
Texas Limited Partnership; AMERICA'S
WHOLESALE LENDER, a Business Entity
form unknown; MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC. a Business Entity, form
unknown; ALL PERSONS UNKNOWN,
CLAIMING ANY LEGAL OR
EQUITABLE RIGHT, TITLE, ESTATE,
LIEN, OR INTEREST IN THE PROPERTY
DESCRIBED IN THE COMPLAINT
ADVERSE TO PLAINTIFF'S TITLE, OR
ANY CLOUD ON PLAINTIFF'S TITLE
THERETO; and DOES 1-100, inclusive,

Defendants.

Case No: 2:11-cv-01564-DDP-FMO

[Los Angeles County Superior
Court Case No: BC453485]

[Assigned to the Honorable Dean D.
Pregerson, Dept. 3, Spring Street]

**BAC HOME LOANS
SERVICING, LP'S NOTICE OF
MOTION AND MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

Rule 12(b)(6)

Date: April 4, 2011
Time: 10:00 a.m.
Courtroom: 3

Complaint Filed: January 20, 2011

1 TO PLAINTIFF, HIS COUNSEL OF RECORD, AND THE CLERK OF
2 THE ABOVE-ENTITLED COURT:

3 PLEASE TAKE NOTICE that on April 4, 2011 at 10:00 a.m. or as soon
4 thereafter as the matter may be heard in Courtroom 3 of the above-entitled Court,
5 located at 312 North Spring Street, Los Angeles CA 90012, defendant BAC Home
6 Loans Servicing, LP ("BACHLS") will move this Court for an order pursuant to
7 Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the Complaint of
8 plaintiff Derl Brown II ("Plaintiff") without leave to amend.

- 9 1. The entire Complaint, which challenges the foreclosure of Plaintiff's
10 loan, fails to state a single claim for relief because Plaintiff has not
11 properly or plausibly alleged tender of the outstanding balance of his
12 loan. Rule 12(b)(6).
- 13 2. Plaintiff's first and fourth claims for wrongful foreclosure fail because
14 Plaintiff has not alleged facts sufficient to allege a violation of
15 California's non judicial foreclosure statutes, and has not alleged that
16 he will tender his loan balance. Rule 12(b)(6).
- 17 3. Plaintiff's fifth and sixth claims to void various documents fails to state
18 facts sufficient to state a claim because Plaintiff has not alleged facts to
19 state a viable theory upon which any document may be rescinded or
20 declared void, and because Plaintiff has not tendered his outstanding
21 loan balance. Rule 12(b)(6).
- 22 4. Plaintiff's seventh claim for breach of contract fails because Plaintiff
23 has not alleged facts sufficient to demonstrate a breach of any
24 contractual provision, his performance under his loan agreement, or his
25 tender of the outstanding loan balance. Rule 12(b)(6).
- 26 5. Plaintiff's eighth claim for breach of the implied covenant of good faith
27 and fair dealing fails to state facts sufficient to state a claim because
28 plaintiff has not pleaded any act by any Defendant that frustrated his

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rights under the loan agreement, and because he has not alleged tender of the outstanding balance of his loan. Rule 12(b)(6).

6. Plaintiff's ninth claim for purported violation of Section 17200 of the California Business and Professions Code ("UCL") fails to state facts sufficient to state a claim because Plaintiff has not alleged facts to demonstrate that he has standing to sue under the statute, has not plausibly pled predicate wrongful conduct, and has not plausibly alleged that he will tender his outstanding loan balance. Rule 12(b)(6).
7. Plaintiff's second claim for quiet title fails because Plaintiff has not alleged facts sufficient to demonstrate that he has, can, or will pay off the amount he borrowed under his loans, and because Plaintiff has not alleged facts sufficient to support a viable theory why he can eviscerate the lien burdening his property. Rule 12(b)(6).
8. Plaintiff's tenth claim for injunctive relief fails because injunctive relief is not an independent claim, and because Plaintiff has not alleged sufficient facts to support an underlying right to injunctive relief. Rule 12(b)(6).
9. Plaintiff's third claim for declaratory relief fails to state facts to support a declaratory relief claim because Plaintiff has not alleged any independent basis for relief. Rule 12(b)(6).

1 This Motion is made following the conference of counsel pursuant to Local
2 Rule 7-3, which took place by telephone on February 25, 2011.

3 The Motion is based on this Notice, the attached Memorandum of Points and
4 Authorities, the concurrently filed Request for Judicial Notice, the files and records
5 herein, and such further evidence as may be received by the Court.

6
7 Dated: March 1, 2011

Respectfully submitted,

8 **BRYAN CAVE LLP**
9 Glenn J. Plattner
10 David Harford

11 By: /s/David Harford

David Harford

12 Attorneys for Defendants
13 RECONTRUST COMPANY, N.A.;
14 COUNTRYWIDE HOME LOANS, INC. for
15 itself and dba AMERICA'S WHOLESALE
16 LENDER; and BAC HOME LOANS
17 SERVICING, LP
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120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On March 31 2006, Plaintiff Derl Brown II (“Plaintiff”) executed a Deed of Trust and Adjustable Rate Note in which Plaintiff took out a loan for \$376,000 secured by property at 715 W 117th Street Los Angeles, California 90044 (the “Property”). Plaintiff also obtained a Home Equity Line of Credit Loan secured by the Property for \$47,000. Less than two years after obtaining those loans, Plaintiff defaulted, and has failed to make regular loan payments ever since.

Now, over three years after defaulting, and two and a half years after a notice of default was recorded, Plaintiff has sued multiple parties claiming that the foreclosure of the Property securing his loan is invalid based on erroneous legal theories and scantily pleaded facts. Despite the fact that the Complaint is only concerned with the foreclosure of his loan, Plaintiff sues his original lender, America’s Wholesale Lender (“AWL”), which is a trade name for Countrywide Home Loans, Inc.’s wholesale lending division (“CHL”), CHL itself, and the substituted trustee under his deed of trust, ReconTrust Company, N.A. (“ReconTrust”). But the entire Complaint (“Compl.”) is inadequate to state a claim against defendants CHL and ReconTrust because both have been fraudulently joined in this lawsuit. As to the Defendant who authorized the institution of foreclosure proceedings when Plaintiff Defaulted—his servicer, BAC Home Loans Servicing, LP (“BACHLS”)—and the named beneficiary under his Deed of Trust—Mortgage Electronic Registration Systems, Inc. (“MERS”)—Plaintiff has not properly alleged the prerequisite that he will tender the balance of his loan, and relies on theories about MERS that have been roundly rejected by California courts.

Considered individually, all ten counts in the FAC fail to state a claim upon which relief may be granted. Specifically, in addition to his failure to tender his loan balance, which bars every one of his claims:

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- 1 • Plaintiff's first and fourth claims for wrongful foreclosure fail because they
- 2 do not allege violation of California's nonjudicial foreclosure statutes.
- 3 • Plaintiff's fifth and sixth claims to void various documents fail to set forth
- 4 any viable theory upon which any document may be rescinded or declared void.
- 5 • Plaintiff's seventh claim for breach of contract fails because Plaintiff has
- 6 not alleged a breach of any contractual provision, and because he has alleged his
- 7 own unexcused *non*performance under his loan agreement.
- 8 • Plaintiff's eighth claim for breach of the implied covenant of good faith and
- 9 fair dealing fails because plaintiff has not pleaded any act by Defendants that
- 10 frustrated his rights under the loan agreement.
- 11 • Plaintiff's ninth claim for purported violation of Section 17200 of the
- 12 California Business and Professions Coded ("UCL") fails because Plaintiff has
- 13 not plausibly alleged standing or predicate wrongful conduct.
- 14 • Plaintiff's second claim for quiet title fails because Plaintiff has not paid off
- 15 the amount he borrowed under his loans, and because Plaintiff has not alleged
- 16 any valid reason to eviscerate the lien encumbering his property.
- 17 • Plaintiff's tenth claim for injunctive relief fails because injunctive relief is
- 18 not an independent claim, and because he has not alleged an underlying right to
- 19 injunctive relief.
- 20 • Plaintiff's third claim for declaratory relief likewise fails because Plaintiff
- 21 has not alleged any independent basis for relief.

22 In short Plaintiff's claims are so lacking in legal and factual support that
23 granting leave to amend would be futile, and the Court should grant BACHLS's
24 Motion to Dismiss without leave to amend.

25 **II. FACTUAL BACKGROUND**

26 The allegations of Plaintiff's Complaint are sparse, conclusory, confusingly
27 presented, and often contradicted by documents. Plaintiff alleges that on March 31,
28 2006 he entered into two loan transactions with CHL, one for \$376,000 and one for

1 \$47,000. (Compl., ¶ 24.)¹ Only the Deed of Trust securing the \$376,000 loan is
2 attached to the Complaint. (*Id.* at Ex. A.) That Deed of Trust explicitly names
3 MERS as the nominal beneficiary and grants MERS the same powers as a
4 beneficiary. (*Id.* at Ex. A, p.4.)

5 Plaintiff alleges that he defaulted on his loan payments. (*Id.* at ¶ 28.) A
6 Notice of Default, recorded on April 9, 2008 shows that he has been in default since
7 December 1, 2007. (*Id.* at Ex. C, p. 2.)

8 Two days before issuance of the notice of default, on April 7, 2008, MERS
9 substituted ReconTrust as trustee in a Substitution of Trustee that was later
10 recorded. (Request for Judicial Notice “RJN,” Ex. A.)²

11 On July 15, 2008, ReconTrust, as the substituted Trustee, recorded a Notice
12 of Trustee’s Sale. (*Id.* at Ex. C, pp. 3-4.) That Notice set the sale date for July 31,
13 2008. (*Id.*, Ex. C, p.3.)

14 Plaintiff alleges that the July 2008 sale date was voluntarily cancelled, and
15 that he then asked for a loan modification. (*Id.* at ¶ 31.) Plaintiff demanded a
16 modification of the loan agreement he had made just two years earlier “to a fixed
17 rate loan because the interest did not allow Plaintiff to pay his loan and build
18 equity.” (*Id.*)³ Plaintiff alleges that he received inconsistent information from
19 “Countrywide and/or its agents” over a one-and-one-half year period in which
20 sometimes sought information about loan modification. (*Id.* at ¶¶ 31-36.)

21 Notably, Plaintiff does not allege that he attempted to make payments on his
22 loan, tried to cure his default, or did anything other than to seek new loan terms.

23 Plaintiff also alleges that he sent a “written request” to BACHLS in 2009, and
24 that no party provided “adequate answers” to that request. (*Id.* at ¶¶ 36, 39.) Yet he

25 ¹ The Complaint makes no allegations regarding foreclosure of the second loan.

26 ² Although Plaintiff purports to attach that substitution to the Complaint as Exhibit B, Exhibit B is
27 a substitution executed on May 28, 2010. (Compl., ¶30; Ex. B.)

28 ³ Plaintiff later alleges, without explaining this inherent contradiction, that he “has built equity in
the subject property” and that Defendants are now trying to take it from him. Compl. ¶ 104.

1 does not attach (or even describe) that written request or any response received, and
2 he does not identify what was inadequate about the response.

3 On May 28, 2010, MERS assigned its beneficial interest under the Deed of
4 Trust to BACHLS. (*Id.* at ¶ 37, Ex. B.) The same assignment document also again
5 appointed ReconTrust as substituted trustee under the Deed of Trust. (*Id.*)

6 On June 6, 2010, ReconTrust re-noticed the sale date for the Property, setting
7 a sale date for June 22, 2010. (*Id.* at Ex. D.) Plaintiff alleges that the sale date has
8 been postponed until at least January 20, 2011. (*Id.* at ¶ 38.) This lawsuit was filed
9 on that day in an attempt to further postpone foreclosure of the Property.

10 **III. STANDARD OF REVIEW**

11 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of
12 the complaint. “To survive a motion to dismiss, a complaint must contain sufficient
13 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
14 face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v.*
15 *Twombly*, 550 U.S. 544, 570 (2007)). “Threadbare recitals of the elements of a
16 cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*,
17 129 S. Ct. at 1949. Rather, the “[f]actual allegations must be enough to raise a right
18 to relief above the speculative level” *Twombly*, 550 U.S. at 545. In addition to
19 the complaint itself, a court may consider any written instrument attached to the
20 complaint, statements or documents incorporated into the complaint by reference,
21 and documents possessed by or known to the plaintiff and upon which the claims
22 rely. *ATSI Comm., Inc. v. The Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007).
23 The court should disregard allegations that are contradicted by exhibits to the
24 complaint, or by documents referred to in the complaint and considered pursuant to
25 judicial notice. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

26 A court can dismiss claims without granting leave to amend if amendment
27 would be futile. *See Vasquez v. L.A. County*, 487 F.3d 1246, 1258 (9th Cir. 2007).⁴

28 ⁴ This case was filed in state court and removed on behalf of BAC. “Notice of Removal”

1 **IV. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE**
2 **PLAINTIFF HAS NOT COMPLIED WITH THE TENDER RULE**

3 Under California law, a plaintiff challenging a foreclosure sale must allege
4 tender under “any cause of action for irregularity in the sale procedure.” *Abdallah v.*
5 *United Savs. Bank*, 43 Cal. App. 4th 1101, 1109 (1996) (affirming the sustaining of
6 demurrer without leave to amend). “When a debtor is in default of a home mortgage
7 loan, and a foreclosure is either pending or has taken place, the debtor must allege a
8 credible tender of the amount of the secured debt to maintain any cause of action for
9 wrongful foreclosure.” *Alicea v. GE Money Bank, No.*, C 09-00091 SBA, 2009 WL
10 2136969, at *3 (N.D. Cal. July 19, 2009). To properly allege tender, the debtor
11 “must (1) demonstrate a willingness to pay and (2) show the ability to pay.”
12 *Pantoja v. Countrywide Home Loans, Inc.*, 640 F. Supp. 2d 1177, 1184 (N.D. Cal.
13 2009). In California, “[t]he rules which govern tenders are strict and are strictly
14 applied” *Nguyen v. Calhoun*, 105 Cal. App. 4th 428, 439 (2003). “This
15 requirement is based on the theory that one who is relying upon equity . . . is able to
16 perform his *obligations under the contract* so that equity will not have been
17 employed for an idle purpose.” *Dimock v. Emerald Properties, LLC*, 81 Cal. App.
18 4th 868, 878 (2000) (emphasis added). Therefore, “it is a debtor’s responsibility to
19 make an unambiguous tender of the entire amount due [under the contract] or else
20 suffer the consequence that the tender is of no effect.” *Id.*

21 The tender requirement applies to any claim “implicitly integrated” with the
22 foreclosure sale – not merely claims that challenge the sale, but also those that seek
23 damages related to the sale. *See Arnolds Management Corp. v. Eischen*, 158 Cal.

24
25 (Dkt. No. 1) (Feb. 22, 2011). ReconTrust Company, N.A. and Countrywide Home Loans, Inc., for
26 itself and doing business as America’s Wholesale Lender, are also named as defendants, but, as
27 explained in the Notice of Removal, their citizenship should be disregarded. *Id.* at ¶¶ 7-9. As
28 fraudulently joined defendants, ReconTrust and Countrywide are not liable to Plaintiffs. *See*
Isaacs v. Broido, 358 F. App’x 874, 877 (9th Cir. 2009) (requiring district court to dismiss
fraudulently-joined defendants); *United Computer Sys. v. AT&T Info. Sys.*, 298 F.3d 756, 761 (9th
Cir. 2002) (approving of dismissal of fraudulently-joined defendant). In any event, those
defendants should be dismissed for the same reasons as BAC.

1 App. 3d 575, 579 (1984) (affirming demurrer without leave to amend on claims of
2 wrongful foreclosure, fraud, and negligence relating to foreclosure sale); *Karlsen v.*
3 *Am. Sav. & Loan Ass'n*, 15 Cal. App. 3d 112, 121 (1971) (ruling that claims for
4 breach of oral agreement, accounting, and constructive trust failed absent tender).

5 Here, all ten causes of action in the Complaint are subject to the tender
6 requirement because every single claim is founded upon Plaintiff's erroneous
7 theories as to why the foreclosure process has been improperly conducted. (*See*
8 Compl., ¶¶ 44 (first claim), 50-52 (second claim), 56 (third claim), 66 (fourth
9 claim), 77 (fifth claim), 79 (sixth claim), 84 (seventh claim), 91 (eighth claim), 96
10 (ninth claim), 105 (tenth claim).) Because Plaintiff has not alleged that he is willing
11 and capable of tendering the outstanding balance of his loan, his entire Complaint
12 fails to state a claim sufficient to challenge the foreclosure and should be dismissed.

13 Plaintiff's implausible, conclusory allegations about "tender" (*e.g., id.* ¶¶ 50
14 (offering to tender "subject to an equitable adjustment"), 104 (offering tender or
15 "bond to secure the res during the pendency of this matter)) do not change the legal
16 analysis. First, Plaintiff is not willing to tender the full amount of "the secured
17 debt." *Alicea*, 2009 WL at *3. Plaintiff's conditional, qualified responses show a
18 willingness only to partially perform, and a misguided notion that he is entitled to
19 pay less than the full amount because defendants are exercising their right to
20 foreclose. He does not allege that he is willing to fully perform "under the
21 contract." *Dimock*, 81 Cal. App. 4th at 878. Second, Plaintiff has not alleged
22 capacity to tender with facts that would plausibly support such an allegation.
23 Indeed, the relevant facts in the Complaint indicate the opposite—Plaintiff has no
24 capacity to make payments under his loan agreement. Plaintiff went into default
25 because he could not afford to make the loan payments, and has not made regular
26 payments since December 1, 2007. (Compl., ¶ 28; Ex. C, p. 2.) Without stating that
27 his financial condition has improved since then, Plaintiff cannot plausibly allege that
28 he can cure three years worth of default, let alone tender the balance of the loan.

1 Thus Plaintiff has not properly alleged his capacity to tender, and the entire
2 Complaint—which challenges the foreclosure—should be dismissed with prejudice.

3 **V. PLAINTIFF’S MERS RELATED ALLEGATIONS ARE ERRONEOUS**

4 The Complaint relies largely on several meritless theories related to MERS’s
5 involvement in the foreclosure of his property. Plaintiff alleges, variously: that
6 MERS has no authority or “standing” to foreclose, to assign the deed of trust, or to
7 substitute the beneficiary because “MERS had no security interest” under the deed
8 of trust and is not named in Plaintiff’s Note (*i.e.*, Compl., pp. 10-11, ll. 13-25 & ll. 3
9 -12). He also argues that MERS is not licensed in California, and therefore that the
10 Deed of Trust is voidable. (*Id.* at ¶¶ 74-77.) These allegations are insufficient to
11 support any legal claim for relief.

12 **A. MERS Properly Served as Nominal Beneficiary**

13 Many of the same California law arguments that Plaintiff makes here were
14 considered, and rejected, in *Gomes v. Countrywide Home Loans, Inc.*, No. D057005,
15 --- Cal.Rptr.3d ----, 2011 WL 566737 (Feb. 18, 2011), a very recent opinion by the
16 California Court of Appeal. As the Court of Appeal held in *Gomes*, MERS, as
17 nominee for a beneficiary under a deed of trust, may exercise the right to foreclose.
18 *Id.* *4-5. *Gomes* explains that California law does not permit a borrower to
19 challenge the non-judicial foreclosure of a loan simply because MERS is a nominal
20 beneficiary under the borrower’s deed of trust. Such a right of action “would
21 fundamentally undermine the nonjudicial nature of the [foreclosure] process and
22 introduce the possibility of lawsuits filed solely for the purpose of delaying valid
23 foreclosures.” *Id.* at *4. The *Gomes* holding is also rooted in Plaintiff’s explicit
24 agreement, in the Deed of Trust, to MERS’s powers as nominee beneficiary:
25 “Gomes’s agreement that MERS has the authority to foreclose . . . precludes him
26 from pursuing a cause of action premised on the allegation that MERS does not have
27 the authority to do so.” *Id.* at *5.

28 For the same reason, numerous federal courts in California before *Gomes*

1 have explicitly held that MERS, as nominal beneficiary under a deed of trust, has
2 the same authority as a beneficiary under a deed of trust. *See, e.g., Castaneda v.*
3 *Saxon Mortgage Services, Inc.*, 687 F. Supp. 2d 1191, 1198 (E.D. Cal. 2009)
4 (holding that MERS had authority to assign a deed of trust).

5 In this case, Plaintiff, like the plaintiff in *Gomes*, explicitly agreed to the
6 arrangement which he now complains about. His Deed of Trust clearly identifies
7 MERS's role as nominal beneficiary with the same powers as the beneficiary:

8 "The beneficiary of this Security Interest is MERS (solely as nominee for
9 Lender and Lender's successors and assigns) and the successors and assigns of
10 MERS." (Compl., Ex. A, p.4 ("TRANSFER OF RIGHTS IN PROPERTY").)

11 "Borrower understands and agrees that MERS holds only legal title to the interests
12 granted by Borrower in this Security Instrument, but, if necessary to comply with
13 law or custom, **MERS** (as nominee for Lender and Lender's successors and assigns)
14 ***has the right: to exercise any or all of those interests, including, but not limited to,***
15 ***the right to foreclose and sell the Property...***" (*Id.* at Ex. A, p. 4 (emphasis added).)

16 As in *Gomes*, Plaintiff cannot now assert that his foreclosure is invalid simply
17 because MERS has exercised its contractual powers under the agreement he signed.
18 This fundamentally flawed argument underlies all of Plaintiff's claims, each of
19 which should be dismissed.

20 **B. MERS is Licensed and Qualified to do Business in California**

21 MERS, a Delaware corporation, has never operated illegally in California.
22 Cal. Corp. Code § 167. Although foreign corporations are ordinarily required to
23 obtain a certificate of qualification from the Secretary of State before they "transact
24 intrastate business," Cal. Corp. Code § 2105(a), MERS's creation of "evidences of
25 debt or mortgages, liens or security interests on real or personal property" does not
26 constitute intrastate business. Cal. Corp. Code § 191(c)(7). Numerous courts have
27 ratified MERS's conduct in this State as an unregistered foreign corporation. *See*
28

1 *Castaneda*, 687 F. Supp. 2d at 1198, n. 3 (2009); *Lomboy v. SCME Mortgage*
2 *Bankers*, No. C-09-1160-SC, 2009 WL 1457738, at *3 (N.D. Cal. May 26, 2009).

3 Moreover, the issue is now moot. On July 21, 2010, MERS registered with
4 California's Secretary of State, and therefore it is "entitled to have its prior
5 transactions given full effect." See *Perlas v. Mortgage Electronic Registration*
6 *Systems, Inc.*, No. C 09-4500 CRB, *11 (N.D. Cal., Aug. 5, 2010) (citing *United*
7 *Medical Management Ltd. v. Gatto*, 49 Cal. App. 4th 1732, 1741 (1996) (California
8 law provides for retroactive validation of contracts)). Plaintiff's allegations to the
9 contrary, Compl. ¶¶ 74-77, have no basis in law or fact.

10 In summary, because Plaintiff explicitly agreed to MERS's authority, MERS
11 has not been conducting business in California illegally, and because no provisions
12 of Federal or California law provide to the contrary, Plaintiff's contentions
13 regarding MERS do not provide a legal ground to support a single one of Plaintiff's
14 claims in his Complaint against BACHLS, or any other defendant.

15 **VI. EACH OF PLAINTIFF'S INDIVIDUAL CLAIMS FAIL**

16 **A. Plaintiff Fails to State a Claim for Wrongful Foreclosure**

17 Plaintiff's first claim for "wrongful institution of foreclosure proceedings"
18 (Compl., p. 12, ll. 4) and fourth claim for violation of various statutes related to non-
19 judicial foreclosure (*Id.*, p. 17, ll. 3)⁵ both assert that the foreclosure is wrongful.
20 Both claims fail because Plaintiff has not alleged that BACHLS violated any of the
21 provisions of California's non-judicial foreclosure statutes or any other provision of

22
23 ⁵ The conclusory way in which Plaintiffs' statutory claims are pleaded provides an independent
24 ground for dismissal of Count 4. See *Padayachi v. IndyMac Bank*, 2010 U.S. Dist. LEXIS
25 120963, at *2 (N.D. Cal. Oct. 28, 2010) (dismissing wrongful foreclosure complaint for failure "to
26 allege clearly what role each Defendant played in the loan transaction at issue and how each
27 Defendant's actions violated particular provisions of the applicable statutes"); *Velasquez v. Chase*
28 *Home Fin. LLC*, 2010 U.S. Dist. LEXIS 82065, at *25 (N.D. Cal. Aug. 11, 2010) (dismissing
claim for insufficient particularity when "[p]laintiff d[id] not state how defendants violated
RESPA, or claim violations under specific sections of the statute"); *Cross v. Downey S&L Ass'n*,
2009 U.S. Dist. LEXIS 17946, at *20 (C.D. Cal. Feb. 23, 2009) (claim was not adequately pled
under cited statutes where plaintiff failed to explain how statutes were violated).

1 California law, and has not alleged harm flowing from any purported irregularity in
2 the foreclosure sale.

3 California Civil Code sections 2924 *et seq.* set forth the requirements for
4 conducting a non-judicial foreclosure in California. These code sections are
5 comprehensive, and courts refuse to impose requirements not found therein on
6 foreclosure proceedings. *Homestead Sav. v. Darmiento*, 230 Cal. App. 3d 424, 432-
7 33 (1991); *Moeller v. Lien*, 25 Cal. App. 4th 822, 834 (1994); *Gomes*, 2011 WL
8 566737, at *3-4. Thus, Plaintiff's reliance on other statutes is misplaced.

9 And, to succeed on a wrongful foreclosure claim, plaintiff must allege he was
10 harmed by any purported irregularity in the foreclosure sale, or that foreclosure
11 would have been averted but for any alleged deficiencies. *Reynoso v. Paul Fin'l*
12 *LLC*, Case No. 09-CV-3225, 2009 U.S. Dist. LEXIS 106555, at *13 (N.D. Cal. Nov.
13 16, 2009). Courts reject attempts to undo foreclosure sales based on allegations of
14 procedural irregularities where plaintiffs do not allege harm from such irregularities.
15 *Id.*; *Pantoja*, 640 F. Supp. 2d at 1186; *Lehner v. United States*, 685 F.2d 1187, 1190-
16 91 (9th Cir. 1982). Here, Plaintiff does not show that any foreclosure-related harm
17 resulted from anything other than his own default on his loan obligations.

18 Considering the composite parts of Plaintiff's wrongful foreclosure claim,
19 other reasons arise for dismissal. The Complaint alleges: (1) MERS's role in the
20 substitution and assignment of the deed of trust is improper because it is only a
21 nominal beneficiary (Compl., ¶¶ 63-66); (2) none of the foreclosing defendants—
22 whoever that refers to—have the note (*Id.* at ¶¶ 41-42); (3) the loan was sold
23 without notice to plaintiff (*Id.* at ¶ 43); and (4) defendants violated Cal. Civ. Code
24 §§ 2923.5 (Compl. ¶67), 2923.6 (Compl. ¶ 45), 2932.5 (Compl. ¶¶ 61-68), and
25 2934a. (Compl. ¶ 68.) These allegations are insufficient to support a wrongful
26 foreclosure cause of action, because none of them allege a violation of California's
27 non-judicial foreclosure statute, because none of them allege that Defendants' acts
28

1 were what caused Plaintiffs' harm, and because Plaintiff has not alleged tender of
2 his outstanding loan balance.

3 **1. MERS has Authority to Assign the Deed of Trust, to**
4 **Substitute the Trustee, and to Foreclose**

5 As discussed in Part VI, A, *supra*, MERS, as nominal beneficiary under a
6 deed of trust, has the authority to exercise the powers of a beneficiary under a deed
7 of trust. *See Gomes*, 2011 WL 566737, at *4-5; *Castaneda*, 687 F. Supp. 2d at
8 1198; *Lane v. Vitek Real Estate Indus. Group*, 713 F. Supp. 2d 1092, 1099 (E.D.
9 Cal. 2010) (collecting numerous California cases); Compl., Ex. A, p. 3-4.

10 Plaintiff attempts to support his wrongful foreclosure claims on the grounds
11 that MERS assigned the deed of trust and substituted ReconTrust as trustee.
12 (Compl., ¶¶61-67.) Because MERS has the authority to do this under California law
13 and Plaintiff's Deed of Trust (*Id.* at Ex. A, p. 4), this ground cannot support
14 Plaintiff's wrongful foreclosure claims against Defendants.

15 **2. The original promissory note is not required for a valid**
16 **foreclosure**

17 Courts in California have repeatedly held that the original note need not be
18 produced in order to render nonjudicial foreclosure proceedings valid. *See, e.g.,*
19 *Cal. Trust Co. v. Smead Inv. Co.*, 6 Cal. App. 2d 432, 434-35 (1935); *Pantoja v.*
20 *Countrywide Home Loans*, 640 F. Supp. 2d 1177, 1186 (N.D. Cal. 2009) (citing Cal.
21 Civ. Code § 2924); *Ultreras v. ReconTrust Co.*, No. 09-CV-08810, 2010 WL
22 2305857, at *4 (C.D. Cal. June 07, 2010) (Pregerson, J.) (“[U]nder California law,
23 production of the original note is not required to initiate a non-judicial
foreclosure.”).

24 Plaintiff alleges that the foreclosure is wrongful because, “none of the
25 Defendants . . . had the original note assigned to them.” (Compl., ¶41.) But because
26 California law does not require that the entity conducting the foreclosure produce
27 the note to foreclose, this ground cannot support Plaintiff's wrongful foreclosure
28 claims.

1 3. **Plaintiff has no statutory or contractual right to receive**
2 **notice of a sale of his loan**

3 Promissory notes are negotiable instruments under Article 3 of the Uniform
4 Commercial Code, and are frequently bought and sold. *In re MERSCORP, Inc.*
5 *RESPA Litig.*, MDL Docket No. 1810, 2008 U.S. Dist. LEXIS 40473, at *13 (S.D.
6 Tex. May 16, 2008) (describing the residential mortgage market); *see also Carl I.*
7 *Brown & Co. v. Anderson*, 195 B.R. 87, 91 (B.A.P. 9th Cir. 1996) (noting that
8 promissory notes are frequently sold on the secondary market). Selling a note is
9 perfectly legal. And Plaintiffs expressly agreed to it in the Deed of Trust, which
10 states: “The Note or a partial interest in the Note (together with this Security
11 Instrument) ***can be sold one or more times without prior notice to Borrower.***”
12 (Compl., Ex. A, p.14, § 20 (emphasis added).) Plaintiff’s allegation that the loan is
13 void because it was “sold or transferred without notifying him in writing,” *id.* at ¶43,
14 is contradicted by the Deed of Trust and California law favoring free transferability
15 of contract rights unless the terms and purpose of a contract show “that it was
16 intended to be nonassignable.” *Farmland Irrigation Co. v. Dopplmaier*, 48 Cal. 2d
17 208, 222 (1957); *Superbrace, Inc. v. Tidwell*, 124 Cal. App. 4th 388, 402 (2004).

18 4. **Plaintiff’s Statutory Claims are Meritless**

19 In addition to being unavailable to a Plaintiff in a wrongful foreclosure suit
20 because the non-judicial foreclosure process is comprehensively governed by Cal.
21 Civ. Code § 2924 et seq., Plaintiff’s statutory claims fail for other reasons.

22 a. **No Private Right of Action Under Sections 2923.6, and 2932.5**

23 “Adoption of a regulatory statute does not automatically create a private right
24 to sue for damages resulting from violations of the statute. Such a private right of
25 action exists only if the language of the statute or its legislative history clearly
26 indicates the Legislature intended to create such a right to sue for damages.” *Vikco*
27 *Ins. Servs., Inc. v. Ohio Indem. Co.*, 70 Cal. App. 4th 55, 62 (1999). The California
28 Legislature must manifest its intent to create a private right of action “directly, in

1 clear, understandable, unmistakable terms” *Moradi-Shalal v. Fireman’s Fund Ins.*
2 *Cos.*, 46 Cal. 3d 287, 294-95 (1988).

3 Courts have specifically held that Sections 2923.6, and 2932.5 of the Civil
4 Code do not confer a private right of action. *E.g.*, *Mabry v. Superior Court*, 185
5 Cal. App. 4th 208, 211 (2010) (ruling that no private right of action exists under §
6 2923.6); *Alford v. Wachovia Bank/World Sav. Bank*, 2010 WL 415260, at *12 (E.D.
7 Cal. Jan. 26, 2010) (Section 2932.5 provides “no private cause of action”).

8 **b. None of the Statutes Apply to Plaintiff’s Foreclosure**

9 Section 2923.5 defines the notice given to borrowers in default.⁶ But the
10 claim fails because the statute was not in effect at the time. The Notice of Default in
11 this case was recorded on April 9, 2008—prior to September 8, 2008, the effective
12 date of Section 2923.5. *Fortaleza v. PNC Fin’l Servs. Group, Inc.*, No. C 09-2004
13 PJH, 642 F. Supp. 2d 1012, 1020 (N.D. Cal. 2009) (dismissing Section 2923.5 claim
14 where Notice of Default was recorded before provision’s effective date); Cal. Civ.
15 Code § 2923.5(j) (stating effective date of September 8, 2008). Thus, no party was
16 required to contact Plaintiff before recording the Notice of Default. Plaintiff cannot
17 support his wrongful foreclosure claims on this ground.

18 Section 2923.6 provides that a mortgage servicer does not violate its duty to
19 purchasers of pooled mortgage securities by implementing a loan modification plan
20 under certain circumstances not applicable here. Plaintiff alleges that his
21 foreclosure is wrongful because “[defendants] failed to comply with Civil Code
22 Section 2923.6.” (Compl., ¶46.) But Section 2923.6 “conspicuously does not
23 require lenders to take any action”; instead, it “merely expresses the *hope* that
24 lenders will offer loan modifications on certain terms.” *Mabry*, 185 Cal. App. 4th at
25 211, n.9. This statute does not support Plaintiff’s wrongful foreclosure claims.

26 ⁶ The caption of Plaintiff’s fourth claim asserts a violation of Section 2923 of the Civil Code, but
27 his allegations shows that he intended to sue under Section 2923.5: he alleges that BACHLS was
28 required to attempt to contact him before recording the notice of default—which is a recitation of
the requirements of the Civil Code Section 2923.5. (Compl., ¶67.)

1 Section 2932.5 of the Civil Code provides that where a power to sell real
2 property is given to a mortgagee, that power of sale may be exercised by an assignee
3 of the mortgagee if the assignment is recorded. Cal. Civ. Code §2932.5. This section
4 does not apply to deeds of trust. *Roque v. Suntrust Mortg., Inc.*, 2010 WL 546896, at
5 *3 (N.D. Cal. Feb. 10, 2010); *Selby v. Bank of America, Inc.*, No. 09-cv-2079, 2010
6 WL 4347629, *3 (S.D. Cal. Oct. 27, 2010).⁷ Here, Plaintiff admits that he entered
7 into a loan evidenced by a deed of trust. (Compl., Ex. A.) Therefore, Plaintiff
8 cannot complain that the loan was not properly assigned as required by Section
9 2932.5.

10 Civil Code Section 2934a governs the procedure by which a trustee under a
11 deed of trust may be substituted. It simply requires the recordation of a substitution
12 document that has been executed and acknowledged by all the beneficiaries under
13 the trust deed. Cal. Civ. Code § 2934a(a)(1).

14 Here, although Plaintiff alleges in conclusory terms that ReconTrust was not
15 “duly appointed” (Compl., ¶ 68), the substitution of ReconTrust for the prior trustee
16 was properly made before ReconTrust acted as Trustee by recording the Notice of
17 Trustee’s Sale on July 15, 2008. (*Id.* at Ex. C, p.3.) The substitution was recorded
18 concurrently with the Notice of Sale. (RJN, Ex. A.) And contrary to Plaintiff’s
19 implied assertion that the substitution was inadequate on the basis that the
20 substitution was recorded after the Notice of Default (*Id.* at ¶¶ 29-30), a substitution
21 of trustee is a valid on the date that it is executed. *See Wilson v. Pac. Coast Title Ins.*
22 *Co.*, 106 Cal. App. 2d 599, 602 (1951). Thus because the substitution was executed

23
24 ⁷ The Court in *Selby* succinctly explains why the section is inapplicable to deeds of trust: “Section
25 2932.5 applies only to mortgages that give a power of sale to the creditor, not to deeds of trust
26 which grant a power of sale to the trustee [because (citing California case law)] ‘The transferee of
27 a negotiable promissory note, payment of which is secured by a deed of trust whereby the title to
28 the property and the power of sale in case of default is vested in a third party as trustee, is not an
incumbrancer to whom power of sale is given, within the meaning of section 858 of the Civil
Code [which was the] predecessor to § 2932.5.’” *Id.* (internal citations omitted).

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120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

1 on April 7, 2008—2 days before the Notice of Default was recorded—ReconTrust
2 had already been properly substituted as trustee. (*Compare* RJN, Ex. A. to Compl.
3 Ex. C, pp. 1-2.) Further, MERS is the only beneficiary named under the Deed of
4 Trust (*Id.*, Ex. A, p. 2.), and MERS executed and acknowledged the substitution
5 according to the requirements of Civil Code 2934a(a)(1). Thus, the substitution was
6 proper under Civil Code Section 2934a.

7 Moreover, even if MERS had not substituted ReconTrust in as Trustee prior
8 to recording the notice of default, the notice of default would still be proper, as
9 ReconTrust executed it as “agent of the beneficiary.” (Compl., Ex. C, p.1.) An agent
10 of the beneficiary (as well as the trustee) may record a notice of default. Cal. Civ.
11 Code §2924(a)(1). *See, e.g., Ramirez v. SCME Mortg. Bankers, Inc.*, 2010 WL
12 2839476, at *2 (S.D. Cal. July 19, 2010).

13 Lastly, MERS, not defendant BACHLS or ReconTrust, substituted the trustee
14 under the deed of trust, so there is no indication that any moving Defendant did
15 anything to violate Civil Code Section 2934a.

16 **5. Plaintiff fails to allege tender**

17 As discussed in Part V, *supra*, a claim for wrongful foreclosure in California
18 must be accompanied by an allegation of tender. *See Abdallah v. United Savs.*
19 *Bank*, 43 Cal. App. 4th at 1109. Here there is no meaningful allegation regarding
20 tender of the outstanding loan balance, therefore Plaintiff cannot proceed with either
21 of his wrongful foreclosure claims.

22 To summarize the deficiencies in Plaintiff’s wrongful foreclosure claims: (1)
23 Plaintiff has not alleged a violation of any of California’s non-judicial foreclosure
24 provisions; (2) he does not allege that Defendant’s conduct was the cause of any
25 harm that has befallen him; (3) he asserts meritless theories about MERS and a non-
26 existent requirement to produce the promissory note; (4) his statutory claims are not
27 privately actionable, are not applicable to Plaintiff, or both; and (5) he fails to allege
28

1 compliance with the tender rule. Thus, the Court should dismiss the first and fourth
2 claims in the Complaint.

3 **B. Plaintiff Fails to State a Claim to Void Any Documents**

4 Plaintiff's fifth and sixth claims seek to stop the foreclosure based on
5 Plaintiff's contention that one of the recorded documents—either the Deed of Trust,
6 Substitution of Trustee, or Assignment of the Deed of Trust is voidable. Plaintiff
7 seems to assert that he can unilaterally void these documents because MERS was
8 unregistered in California (Compl., ¶ 77), and because MERS has no authority under
9 the Deed of Trust to act. (*Id.* at ¶ 79.) Neither theory can support Plaintiff's request
10 for relief because the claims are erroneous, and have no effect on the foreclosure.

11 The California Revenue and Tax Code Section 23304.1(b) allows a party to a
12 contract made by a foreign corporation to void that contract if the foreign
13 corporation fails to file a tax return for the year in which it made that contract. *Id.*
14 Here, plaintiffs' facts are insufficient to state a claim. As in *Sulak v. MERS*.
15 "Plaintiffs' argument consist[ed] of suggestion, conjecture, argument, and inference
16 rather than fact." 2006 WL 3514873, at *10 (Cal. Ct. App. Dec. 7, 2006) .
17 Plaintiff's allegations are articulated in conclusory, boilerplate language without any
18 suggestion of factual support. Compl. ¶¶ 71-76. As discussed in Part VI, B, *supra*,
19 Plaintiff's allegations regarding MERS's capacity to contract have been repeatedly
20 rejected by courts considering them; also, MERS is now registered in California and
21 is entitled to have all its contracts given full effect.

22 Moreover, even "[i]f the court finds that the contract is voidable under
23 Section 23304.1 . . . in no event shall the court order rescission . . . unless the
24 [foreign corporation] receives *full restitution of the benefits provided by the*
25 *[foreign corporation] under the contract.*" *Id.* §23304.5 (emphasis added). In other
26 words, for Plaintiff to void a contract under the tax and revenue code, the rule of
27 rescission applies, and rescission requires tender. *See* Cal. Civ. Code § 1691(b).
28 *E.g., Periguerra v. Meridas Capital, Inc.*, 2010 WL 395932, at *3 (N.D. Cal. Feb. 1,

2010) (ruling, citing Cal. Civ. Code § 1691(b), that plaintiffs' failure to tender the amount due on their loan prevented them from seeking the remedy of rescission). This comports with the general requirement of tender for foreclosure-related claims under *Abdullah*, which also applies because the ultimate purpose of Counts Five and Six is to void the documents necessary for foreclosure of his loan (*Id.* at ¶¶77, 79).

Finally, Plaintiff's claim that MERS has no authority under his Deed of Trust, *Id.* ¶ 79, fails too as discussed above in Part VI, A, *supra*. MERS has authority under Plaintiff's Deed of Trust to foreclose, assign the deed of trust, and substitute the trustee. (*Id.* at Ex. A, p. 4.)

Because Plaintiff has not supported either his fifth or sixth claim for relief with viable legal theories or adequate facts, and has failed to allege that he will tender his loan proceeds, the Court should dismiss the fifth and sixth claims.

C. Plaintiff's Breach of Contract Claim Fails

The standard elements of a claim for breach of contract are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damage to plaintiff therefrom." *Wall St. Network, Ltd. v. New York Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008) (quoting *Regan Roofing Co. v. Superior Court*, 24 Cal. App. 4th 425, 434-435 (1994)).

Plaintiff shoehorns his meritless MERS theory into a breach of contract claim, alleging that "Defendants breached the note and deed of trust." Compl. ¶ 83. But Plaintiff's allegations do not support a breach of contract claim because Plaintiff has not alleged facts demonstrating that defendants breached any contractual provision. Plaintiff does not mention any particular contractual provision, or how any provision was breached, anywhere in the cause of action. (Compl., ¶¶82-84.) In fact, Plaintiff's allegations and attached exhibits show that the parties to the Note and Deed of Trust acted in full accord with the provisions of those agreements.

Plaintiff also alleges that defendants breached his Note and the Deed of Trust because MERS was not named in the Note and Deed of Trust, and because MERS is

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120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

1 an “imposter beneficiary” with no authority under the loan contract. (Compl., ¶¶81-
2 85.) This allegation has no more merit here than anywhere else in the Complaint.
3 As mentioned throughout the Motion, and in greater detail in Part VI, A, *supra*,
4 MERS has the legal and contractual authority to exercise the same powers as a
5 beneficiary under a deed of trust. Further, Plaintiff’s assertion that his Deed of Trust
6 and Note do not name MERS are inaccurate. MERS is clearly listed in the Deed of
7 Trust as the nominal beneficiary with the power to exercise the same authority as a
8 beneficiary. (*Id.* Ex. A, p. 4.) The Note, which is not attached to the Complaint,
9 incorporates the terms of Plaintiff’s Deed of Trust in Section 11: “In addition to the
10 protections given to the note holder under this Note, a . . . Deed of Trust . . . dated
11 the same date as this Note protects the Note Holder from possible losses. (RJN, Ex.
12 B, § 11 of the Note.) Thus Plaintiff’s Note incorporates MERS’s status as nominee
13 beneficiary under the Deed of Trust, and Plaintiff has, in effect, merely alleged that
14 MERS exercised its contractual authority under the Note and Deed of Trust
15 contracts, rather than alleging that any defendant breached any term of a contract.

16 Plaintiff’s breach of contract claim also fails for two additional reasons. First,
17 Plaintiff has not properly pleaded his own performance under the contract: Plaintiff
18 actually pleads his own breach—his failure to pay—without pleading a legally
19 sufficient excuse. (*See* Compl., ¶ 28; Compl., Ex. C, p. 2.) *See, e.g., Saldate v.*
20 *Wilshire Credit Corp.*, 268 F.R.D. 87, 104 (E.D. Cal. 2010) (dismissing breach of
21 contract claim when plaintiff was in default on his contractual loan obligations).
22 Second, as elsewhere, Plaintiff’s failure to allege tender of the loan balance is fatal
23 to this breach of contract claim, which is implicitly integrated with the conduct of
24 the foreclosure. *Abdallah*, 43 Cal. App. 4th at 1109.

25 Because Plaintiff has not adequately pleaded a breach of any contract, his
26 performance under the contract, or his tender of the loan proceeds, the Court should
27 dismiss the seventh claim.

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120 BROADWAY, SUITE 300
SANTA MONICA, CALIFORNIA 90401-2386

D. Plaintiff's Breach of the Implied Covenant Claim Fails

Every contract contains an implied covenant of good faith and fair dealing that “neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” *Kransco v. Am. Empire Surplus Lines Ins. Co.*, 23 Cal. 4th 390, 400 (2000). However, the implied covenant “does not extend beyond the terms of the contract at issue.” *Poway Royal Mobilehome Owners Ass’n v. City of Poway*, 149 Cal. App. 4th 1460, 1477 (2007). Instead, the “implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract.” *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004).

Plaintiff fails to state a claim for breach of the implied covenant because Plaintiff does not allege conduct by any defendant that kept Plaintiff from exercising his rights under the Note or Deed of Trust to re-instate his loan by paying the full outstanding balance of his missed payments plus late charges. (Compl., ¶¶ 86-91.) On the contrary, Plaintiff alleges that defendants breached the covenant by refusing to honor rights that are not contained in his loan. Plaintiff states that defendants breached the covenant when “they refused to discuss alternatives to foreclosure with Plaintiff” (*id.* at ¶88); and when “MERS allowed their agent to execute the Assignment . . . knowing it had no authority to do so.” (*Id.* at ¶91.)

Neither of the above alleged grounds can support an implied covenant claim because Plaintiff does not have and does not plead a contractual right to be informed of his alternatives to foreclosure under his Loan Agreement.⁸ (Compl., Ex. A; RJN Ex. B.) As for the allegation relating to MERS’s assignment of the Deed of Trust, Plaintiff has no right under the loan agreement to prevent parties to the contract

⁸ Nor can Plaintiff cite any other basis for Defendants owing them a duty to consider a loan modification. Under California law, neither mortgage lenders (*UMET Trust v. Santa Monica Med. Inv. Co.*, 140 Cal. App. 3d 864, 872-73, (1983)) nor trustees under a deed of trust (*Heritage Oaks Partners v. First Am. Title Ins. Co.*, 155 Cal. App. 4th 339, 345 (2007)) nor MERS (*Hardy v. Indymac Fed. Bank*, 263 F.R.D. 586, 593-94 (E.D. Cal. 2009)) owe any common law duty to a borrower in a typical arm’s-length lending transaction.

1 from exercising the rights he contractually agreed for them to have—especially in
2 light of Plaintiff’s admitted default under the Loan Agreement (Compl., ¶28; Ex. C),
3 and in light of the fact that MERS had the authority under the Deed of Trust to
4 assign the loan, substitute the trustee, or foreclose. (Compl., Ex. A, p.4.). As stated
5 in *Sam v. American Home Mortgage Servicing*, “[f]oreclosing upon a loan where
6 such foreclosure is permissible by law and the terms of the loan agreement does not
7 deprive plaintiff of any benefits reasonably expected by the parties to the loan.”
8 2010 WL 761228, at *6 (E.D. Cal. Mar. 3, 2010) (dismissing claim for violation of
9 the implied covenant of good faith and fair dealing).

10 In addition, as mentioned throughout the Motion, Plaintiff’s eighth cause of
11 action fails because of Plaintiff’s failure to allege tender. The conduct complained of
12 in the eighth cause of action relates exclusively to the foreclosure of the loan (*Id.* ¶
13 88-91). Plaintiff must plead his tender of the loan balance in order to state a claim
14 for breach of the implied covenant.

15 **E. Plaintiff’s UCL Claim Fails**

16 Plaintiffs’ Ninth Cause of Action for violation of California’s Unfair
17 Competition Law (“UCL”) is similarly meritless and should be dismissed. The
18 UCL prohibits unlawful, fraudulent, or unfair business practices. Cal. Bus. & Prof.
19 Code § 17200. The prohibition encompasses three separate grounds for a cause of
20 action under the UCL: unlawful, unfair, or fraudulent practices. *People ex rel. Bill*
21 *Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 514-17 (2002). To have
22 standing under any of the three prongs, Plaintiff must show that he suffered an
23 “injury in fact and a loss of money or property caused by unfair competition.”
24 *Peterson v. Cellco P’ship*, 164 Cal. App. 4th 1583, 1590 (2008); *See also* Cal. Bus.
25 & Prof. Code § 17204. An injury in fact is “[a]n actual or imminent invasion of a
26 legally protected interest, in contrast to an invasion that is conjectural or
27 hypothetical.” *Hall v. Time*, 158 Cal. App. 4th 847, 853 (2008).

28 Here, Plaintiff’s UCL claim fails because he has not alleged any money or

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1 property loss caused by Defendants' conduct. *See Kwikset Corp. v. Superior Court*,
2 51 Cal.4th 310, 2011 WL 240278, at *6 (Jan. 27, 2011) (plaintiff must "demonstrate
3 some form of economic injury"). Instead Plaintiff alleges in conclusory fashion:
4 "Plaintiff . . . [has] suffered and will continue to suffer damages in the form of
5 unfair and unwarranted late fees and other improper charges." (Compl., ¶ 99) This
6 boilerplate allegation does not relate to any plausible claim of lost money or
7 property. And, though Plaintiff alleges injury from late fees imposed because of an
8 "improper or premature foreclosure", (Compl., ¶ 96a), he does not allege that he
9 paid any such charges. Even if he had, the facts in the Complaint indicate that those
10 late charges would have been incurred by a proper foreclosure following Plaintiff's
11 admitted default. (*Id.* at ¶ 28; Ex. C.) Without alleging any plausible factual
12 allegations as to why the foreclosure was improper, any purported injury is not
13 sufficient to allege a causal connection necessary for standing under the UCL. *See*
14 *Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1066 (E.D. Cal. 2010)
15 (plaintiff lacked UCL standing where he possessed property after default and
16 property had not been foreclosed on).

17 Even if Plaintiff had standing, his claim would be insufficient. To state a
18 UCL claim, Plaintiff must plead factual allegations establishing some sort of
19 "unlawful, unfair or fraudulent business act or practice," upon which he relied,
20 proximately causing him injury. Cal. Bus. & Prof. Code § 17200. "This cause of
21 action is derivative of some other illegal conduct or fraud committed by a defendant,
22 and 'a plaintiff must state with reasonable particularity the facts supporting the
23 statutory elements of the violation.'" *Lomboy v. SCME Mortgage Brokers*, 2009
24 U.S. Dist. LEXIS 44158, at *16-17 (N.D. Cal. May 26, 2009) (quoting *Khoury v.*
25 *Maly's of California, Inc.*, 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (Ct. App.
26 1993)) (brackets omitted). Thus, a complaint that "fails to differentiate between the
27 different Defendants and also fails to explain how Defendants' actions were
28 unlawful, unfair, and/or fraudulent" should be dismissed. *Caravantes v. Cal.*

1 *Reconveyance Co.*, 2010 U.S. Dist. LEXIS 109842, at *19-20 (S.D. Cal. Oct. 14,
2 2010).

3 Here, Plaintiff does not plausibly allege any unlawful, unfair, or fraudulent
4 business practice. In the most conclusory language, he claims that defendants
5 “instituted improper or premature foreclosure proceedings,” “[r]efus[ed] to modify
6 plaintiff’s mortgage,” “[e]xecut[ed] and record[ed] false and misleading affidavits,”
7 and “[a]ct[ed] as beneficiaries and trustees without the legal authority to do so.”
8 Compl. ¶ 96. These allegations are not only impermissibly vague, but are also
9 premised on the Plaintiff’s other allegations that, as described above, have no
10 foundation in law, and are thus not “derivative of [any] illegal conduct or fraud.”
11 *Lomboy*, 2009 U.S. Dist. LEXIS 44158, at *16-17. Furthermore, the Complaint
12 does not differentiate among the various Defendants, lumping them together as “the
13 Foreclosing Defendants” without describing who these Defendants are, much less
14 identifying which activity was undertaken by which defendant.

15 Moreover, as repeatedly stated throughout this Motion, Plaintiff must, as a
16 prerequisite for any claim challenging his foreclosure, allege tender of the balance
17 of his loan. The UCL claim explicitly challenges the conduct of the foreclosure
18 (*Compl.*, ¶ 96) so Plaintiff’s failure to properly tender is fatal to this claim.

19 Because Plaintiff has failed to allege his standing to sue under the UCL, fails
20 to properly allege predicate conduct, and failed to adequately allege tender of his
21 loan balance, the Court should dismiss Plaintiff’s Ninth claim.

22 **F. Plaintiff’s Quiet Title Claim (Count Two) Fails**

23 In order to state of a cause of action for quiet title, a plaintiff must include (1)
24 a description of the subject property; (2) the title of the plaintiff as to which
25 determination is sought and the basis of the title; (3) the claims adverse to the title of
26 the plaintiff against which a determination is sought; (4) the date as of which the
27 determination is sought; and (5) a prayer for determination of the title of the plaintiff
28 against adverse claims. *Permpoon v. Wells Fargo Bank Nat’l Ass’n*, 2009 U.S. Dist.

1 LEXIS 89723, at *15 (S.D. Cal. Sept. 29, 2009) (citing Cal. Code. Civ. P. §
2 760.020). Plaintiffs' quiet title claim fails for at least two reasons.

3 First, in his effort to obtain title to the Property without satisfying his loan
4 obligations, Plaintiff has not plausibly alleged that he will pay the amount owed on
5 his debt. "California court[s] have clearly held that a plaintiff cannot quiet title in
6 his property 'without discharging his mortgage debt. The cloud upon his title
7 persists until the debt is paid.'" *Mickissack v. Wells Fargo Home Mortg.*, 2010 U.S.
8 Dist. LEXIS 69132, at *22 (S.D. Cal. July 12, 2010) (quoting *Aguilar v. Bocci*, 39
9 Cal. App. 3d 475, 114 Cal. Rptr. 91, 92 (Cal. Ct. App. 1974)).

10 Second, Plaintiff's description of the purported adverse "claims" is directly
11 contradicted by the publicly recorded documents Plaintiff attaches to his complaint.
12 Plaintiff asserts that Countrywide, BAC, and ReconTrust together "hold themselves
13 out as entitled to fee simple ownership of the Subject Property by and through their
14 acquisition of the beneficiary interest from MERS." Compl. ¶ 50. Yet the Deed of
15 Trust, Assignment, and Trustee Substitution (Compl., Ex. A-B) all show these
16 Defendants to be *assignees of a security interest*. Defendants do not assert
17 ownership of fee simple title; they are only exercising their right to foreclose on the
18 property pursuant to the terms of the Deed of Trust because Plaintiff has not cured
19 his default. And the only legal bases that Plaintiff asserts to quiet title are that
20 "MERS has no rights to transfer the beneficiary interest under the note," and that the
21 Defendants somehow failed to comply with Cal. Civ. Code § 2923.5. Compl. ¶ 52.
22 As explained above, neither of these theories have any factual support or legal merit,
23 and neither support a quiet title claim. Plaintiff's request to have title "vested in
24 Plaintiff alone" should thus be dismissed.

25 **G. Plaintiff's Injunctive Relief Claim Fails**

26 "Injunctive relief is a remedy and not, in itself, a cause of action, and a cause
27 of action must exist before injunctive relief may be granted." *Clark v. Countrywide*
28 *Home Loans, Inc.*, No. 1:09-CV-01998, 2010 WL 3154119, *10 (E.D. Cal. Aug. 09,

2010). Plaintiff's tenth claim seeks an injunction only on the basis that Defendants' acts "constitute [sic] a gross violation of established legal principles designed to lawfully and peaceably resolve any legitimate dispute as to title." (Compl., ¶102.) Because there is no independent claim alleged in the tenth claim, the claim fails.

However, even if the Court were to consider it as an independent claim, the request should be dismissed because Plaintiff has not pleaded all the elements required for a grant of preliminary injunctive relief.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Gilman v. Schwarzenegger* __ F.3d __, 2011 WL 198435, at *3 (9th Cir. Jan. 24, 2011) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24-25 (2008)).

Here, Plaintiff has not adequately pleaded the elements required for a grant of injunctive relief. First, Plaintiff has not pleaded a likelihood of success on the merits because, as explained throughout this Motion to Dismiss, he has failed to allege a single viable cause of action. Further, he has also failed to allege that he has no adequate remedy at law; while property is unique, Plaintiff is not entitled to retain property for which he is not paying. (Compl., ¶ 28.) Plaintiff also cannot invoke equitable concerns when an injunction against foreclosure would let him continue to live rent-free without paying his mortgage, as he has done since December 2007. Thus, Plaintiff has not alleged a valid claim for injunctive relief and Count Ten should be dismissed.

H. Plaintiff's Declaratory Relief Claim Fails

"Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." *United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir. 1985).

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1 Furthermore, under California law, “an action in declaratory relief will not lie to
2 determine an issue which can be determined in [an] underlying tort action.” *Cal.*
3 *Ins. Guar. Ass’n v. Superior Court*, 231 Cal. App. 3d 1617, 1623 (1991). A plaintiff
4 may not allege declaratory relief as a claim independent of the substantive claims he
5 alleges. *Gen. of Am. Ins. Co. v. Lilly*, 258 Cal. App. 2d 465, 470 (1968) (“The
6 object of [declaratory relief] is to afford a new form of relief where needed and not
7 to furnish a litigant with a second cause of action for determination of identical
8 issues.”). Here, Plaintiff’s “claim” for declaratory relief is based upon the same set
9 of facts he alleges in his substantive claims; Plaintiff requests a judicial declaration
10 regarding all the meritless MERS and wrongful foreclosure theories strung together
11 in paragraph 39 of his complaint. (Compl., ¶56.) But those allegations were part of
12 his “general allegations” section incorporated into the nine other claims asserted in
13 the Complaint. Plaintiff adds nothing new on this claim, and provides no basis to
14 grant his request for declaratory relief. Thus, the claim for declaratory judgment
15 should be dismissed.

16 **VII. CONCLUSION**

17 For the foregoing reasons, BACHLS and ReconTrust respectfully request this
18 court to Grant the Motion to Dismiss without leave to amend.

19
20 Dated: March 1, 2011

BRYAN CAVE LLP

21
22 By: /s/David Harford

David Harford

Attorneys for Defendants

23 RECONTRUST COMPANY, N.A.;
24 COUNTRYWIDE HOME LOANS, INC. for
25 itself and dba AMERICA’S WHOLESALE
26 LENDER; and BAC HOME LOANS
27 SERVICING, LP
28

CERTIFICATE OF SERVICE
(U.S. Code § 1746)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Bryan Cave LLP, 120 Broadway, Suite 300, Santa Monica, CA 90401. My email address is ddkinder@bryancave.com.

On March 1, 2011, I served the foregoing document, described as **BAC HOME LOANS SERVICING, LP'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**, on each interested party in this action, as follows:

☒ (VIA ELECTRONIC SERVICE): The document was served via The United States District Court –Central District's CM/ECF electronic transfer system which generates a Notice of Electronic Filing (NEF) upon the parties, the assigned judge and any registered user in the case. Each transmission was reported as complete and without error.

☒ (VIA U.S. MAIL): I placed a true copy (or original) of the foregoing document in a sealed envelope addressed to each interested party set forth below. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Bryan Cave LLP, Santa Monica, California. I am readily familiar with Bryan Cave LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, the correspondence would be deposited in the United States Postal Service on that same day in the ordinary course of business. The parties served are as follows:

Azuka L. Uzoh
Law Offices of Azuka L. Uzoh
1930 Wilshire Blvd., Suite 1216
Los Angeles, CA 90012
(213) 483-4020
Attorney for Plaintiff Derl Brown, II

☒ (FEDERAL ONLY) I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 1, 2011, at Santa Monica, California.

/s/ Diane Kinder
Diane Kinder